

The Nature of Social Human Rights Treaties and Standard-Setting WTO Treaties: A Question of Hierarchy?

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Abstract. Social human rights are not held to belong to the category of *jus cogens* norms. At the same time these human rights protect vital matters, such as the right to adequate food, which obviously has a relationship to the right to life. On the other hand, the annexes to the World Trade Organization (WTO) Agreement, which are binding on all WTO member States, has implied a shift from the old General Agreement on Trade and Tariffs (GATT) to the WTO, from pure contractual treaties to more standard-setting treaties. The article seeks to analyse if the obligations *erga omnes* and the concept of ‘multilateral obligations’ are applicable to distinguish between human rights treaties on the one hand and WTO agreements on the other. The background of the analysis is also the work of the International Law Commission (ILC) Study Group on fragmentation of international law, finalised in 2006. The article finds that there is still uncertainty regarding the exact meaning of the term ‘multilateral obligations’. Hence, other concepts such as ‘absolute obligations’ might be preferred in order to characterise human rights treaties, and hence implicitly acknowledge that treaties that protect vital matters may prevail over other treaties, based on the interests which are to be protected.

1. Introduction

Traditionally, there has been a firmly held conviction that with the exception of *jus cogens* norms and the principle of *lex superior*, there is no hierarchy between treaties of international law. To this list can be added treaty provisions which are

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also held to be customary law, and which are generally held to stand above those treaty provisions which are not customary law.

The article¹ seeks to identify the relevance of two other legal approaches which have been introduced for the purpose of explaining the nature of obligations under international law. These are obligations *erga omnes* and multilateral obligations.

Obligations *erga omnes* imply that all States have a legal interest in a State's compliance. Multilateral obligations imply that treaties cannot be amended. The obligations *erga omnes* principle is of a more procedural nature, but is recognised by the ICJ, however, in a rather inconsistent manner.² The multilateral obligations approach is of a more substantive nature, but is only recently introduced in the academic literature, as well as by the ILC.

The obligations *erga omnes* principle and multilateral obligations approach are different from *jus cogens* norms, which is a more restrictive category.³ The existence of *jus cogens* norms implies that treaties which are in conflict with such a norm become void.⁴

Unlike *jus cogens*, it is more difficult to conclude that treaties which are giving rise to obligations *erga omnes* or multilateral obligations have a weight which elevates them above other treaties which do not give rise to such obligations. Obligations *erga omnes* and multilateral obligations can, nevertheless, be considered in the context of interpreting treaties as it is implicitly recognised that treaties in which they are found are of a particular nature that distinguishes these treaties from other treaties.

First, the requirements for analysing treaty relationship and possible treaty conflicts will be presented. Second, the existing principles of solving conflicts between treaties will be analysed, particularly the relationship between the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the International Covenant on Economic, Social and Cultural Rights (hereafter 'Covenant'). The main part of the article is an analysis of obligations *erga omnes* and multilateral obligations, first on a principal level. Then, the legal consequences

¹ The article is based on Chapter 11 of the author's PhD thesis.

² For an overview of the ICJ's use of the term *erga omnes*, see C. J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, Cambridge, 2005) pp. 114, 115, terming its use 'inflationary'.

³ The difference between the two must not be overemphasised, as all *jus cogens* norms give rise to obligations *erga omnes*, and that obligations *erga omnes* are derived from *jus cogens*. See B. Simma, 'From Bilateralism to Community Interest', 250 *Recueil des cours* (1994–VI) (Hague Academy of International Law and Martinus Nijhoff Publishers, The Hague, Boston, London, 1997) p. 300. There can, however, be norms which only give rise to obligations *erga omnes*, not constituting *jus cogens*.

⁴ See Articles 53 and 64 of the Vienna Convention on the Law of Treaties. Prohibition against slavery, torture, aggression, crimes against humanity, apartheid crimes and racial discrimination crimes are generally considered to belong to *jus cogens* norms. The right of self-determination falls within the scope of the prohibition against aggression.

of these findings will be applied in the interpretation of the TRIPS Agreement and the Covenant in order to analyse which of the treaties will prevail over the other treaty in a given situation of treaty conflict.

2. Requirements for Analysing Treaty Relationship and Possible Treaty Conflict

The requirement for a conflict to be established is that there is overlap between the provisions in the two treaties both *ratione materiae* (same subject matter; see Article 30(2) Vienna Convention on the Law of Treaties), *ratione personae* (same State parties; see Article 30(3) Vienna Convention on the Law of Treaties) and *ratione temporis* (same time). Of particular relevance is the overlap regarding subject matter.

Before initiating any analysis on the relationship between the Covenant and TRIPS, there must be an assessment whether provisions of the two treaties in fact *relate to the same subject matter*.⁵ The final report by Koskenniemi on fragmentation of international law emphasises that the same subject matter cannot be the only criteria to establish a basis for analysing the relationship between two treaties,⁶ but the ‘same subject matter’ test will nevertheless be applied. If it is found that the relevant provisions of the TRIPS Agreement and the Covenant simply relate to different subject matter, the relevant provisions of the Vienna Convention do not apply.

TRIPS regulates intellectual property protection, including patent protection for new technical knowledge applied on genetic resources. The Covenant regulates human rights protection, including means to ensure improved methods of production of food as well as access to the food, which is essential for the enjoyment of the right to food, in Article 11(2). Moreover, Article 15(1) recognises the right of everyone to enjoy the benefits of scientific progress—including the results of food research—and its applications, and the right of the inventor to enjoy the moral and material interests resulting from his scientific production, potentially including food production. Common for these provisions is that they relate to ‘improved food’.

While the two treaties relate to the subject matter ‘improved food’, the treaties regulate the subject matter differently. In the context of TRIPS, the most important

⁵ On the distinction between the provisions of a treaty and the treaty as such, see R. Wolfrum and N. Matz, *Conflicts in International Environmental Law, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* Band 164 (Springer, Berlin, Heidelberg, New York, 2003) pp. 149, 150.

⁶ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission—Finalised by Martti Koskenniemi*, A/CN.4/L.682, prepared for the 58th session of the International Law Commission (1 May–9 June and 3 July–11 August 2006), paras. 21–23, 117, 254. In this report, Koskenniemi finds that relationships between treaties are addressed more appropriately by the concept of ‘treaty regimes’.

aspect of the subject matter is the efforts preceeding the improved food, namely the new technical knowledge applied on genetic resources, giving rise to rights in accordance with Articles 27 and 28 of TRIPS.⁷

In the context of the Covenant, the most important aspect of the subject matter is the efforts following from the improved food, namely whether and how such food is made available in a way that improves the right to food, particularly for the most food insecure and vulnerable. The Covenant thus regulates how food is made available at sufficient quantities and at affordable prices.

More generally, the phrase 'same subject matter' can also refer to the issues that are regulated by the treaties, and the means or measures by which these issues are regulated. Food production is regulated in both treaties.

It seems therefore reasonable to conclude that while there are obvious differences between the subject matter in the human rights system (human beings) and the patent and plant variety protection system (protectable inventions or plant varieties), the rights recognised in the two systems both relate to physical food or improved food. The treaties do not need to regulate this subject matter in an identical way.⁸ While it is not correct to state that the subject matter of the two systems is the same, the two treaties relate to the same subject matter. Both the right to food and the relevant patent and plant variety protection could, in effect, depend upon the effective control over this improved food. Therefore, the 'same subject matter' requirement must be considered to be met.

3. Solving Conflict Between Treaties if Harmonious Interpretation is not Possible

A brief analysis of the applicability of the established principles for solving conflicts will be undertaken. These are *lex superior*, *lex posterior* and *lex specialis*.⁹

⁷ Said in more abstract terms with particular relevance for biotechnological inventions relating to food plants, intellectual property rights are constituted through applying an immaterial subject (knowledge) to a material object. This knowledge must relate to the genetic composition of the plant (genotype), and the protection will apply to all physical plants containing this genetic composition (phenotype). TRIPS regulates rights derived from specific and applicable knowledge or intellectual efforts. The right extends to the objects to which this knowledge or intellectual effort is related, implying that the right holder determines others' access to the those products falling within the exclusive rights exercised in accordance with the granted patent based on the patent claims.

⁸ See J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, Cambridge, 2003) pp. 364, 365, based on the fact that conflict can only be identified if there is overlap between treaties *ratione materiae*, as well as *ratione temporis* and *ratione personae*.

⁹ A fourth category of conflict, described by Pauwelyn, *ibid.*, pp. 418–436, is a situation in which both norms are 'equal'. He finds (at p. 434) that the only long-term solution is to "renegotiate either norm as to end the conflict." This fourth category will not be considered in this article.

The analysis focuses on the main theme of this article, the relationship between the Covenant and TRIPS, identifying which of the two treaties is to prevail in situations of conflict.

Lex superior. This principle applies primarily when distinguishing between a *jus cogens* norm and other norms under international law. A treaty is void if one of its provisions conflicts with a *jus cogens* norm.

Of particular relevance in the context of *jus cogens* norms is whether the human rights recognised by the Covenant can also give rise to *jus cogens* norms. As racial discrimination is a *jus cogens* norm, the prohibition of discrimination based on race under Article 2(2) can be considered as constituting a *jus cogens* norm. Also the right of self-determination, as recognised in Article 1, is generally accepted as a *jus cogens* norm, at least those elements of self-determination which relate to breaches of territorial integrity.

With regard to the rights analysed in this article, the initial observation is that catalogues of *jus cogens* norms do not include social human rights, such as the right to food. In principle, therefore, *jus cogens* norms do not apply to the human rights recognised in Part III of the Covenant. Conversely, elements of these rights might be included in other *jus cogens* norms.¹⁰ There is, however, a high threshold for identifying certain treaty provisions as *jus cogens* norms, and the right to food is not held to represent a *jus cogens* norm.

In the context of *lex superior*, there is one other situation that must be clarified. Article 103 of the Charter of the United Nations (UN) reads:

In the event of a conflict between the obligation of the Member of the United Nations under the present Charter, and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The problem with this provision is that it is difficult to identify the specific obligations imposed by the Charter. It is not evident what the phrase “obligations under the present Charter” truly implies.¹¹ It will be analysed whether this

¹⁰ As an example, the right to self-determination, which has a *jus cogens* nature primarily with regard to the political dimensions of the right to self-determination, can be relevant. Article 1(2) includes a prohibition against deprivation of means of subsistence. As food is a means of subsistence, any treaty which allows for the deliberate deprivation of capacities to produce food, through interference in the propagation of plants, contamination or other means, can be found to be void as it violates the right to self-determination. S. Skogly, International Council on Human Rights Policy, *Extra-National Obligations Towards Economic and Social Rights* (2002), p. 22, <www.ichrp.org/ac/excerpts/92.doc>, visited on 2 June 2006, finds that all States are “under an obligation not to deliberately starve people by removing their food.” To remove food must be seen as a deprivation of means of subsistence.

¹¹ In *Lockerbie*, ICJ Reports 1992, p. 15, para. 39, the ICJ found that “in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement...” emphasis added, see also p. 14, para. 37. In the same paragraph, the ICJ confirmed that UN members “are obliged to accept and carry out the decision of the Security Council in accordance with Article 25 of the Charter.”

provision implies that every provision in the Charter which can be understood to constitute an obligation is above any other non-UN provision, independent of the level of generality of both the provision in the Charter and of the provision in a non-UN treaty.

The starting point is the explicit recognition of *human rights in the UN Charter*. Respect for human rights is recognised in Articles 1(3) and 55(c) of the UN Charter.¹² Human rights are also referred to in Article 13(1)(b), in which the General Assembly is mandated to initiate studies and make recommendations for the purpose of assisting in the realisation of human rights, as well as in Articles 62(2) and 68, in which the Economic and Social Council is mandated, respectively, to make recommendations and to set up commissions for the promotion of human rights.

Based on both the explicit recognition of human rights in the Charter itself, as well as the subsequent adoption of conventions, commissions and other mechanisms, based on Articles 13(1)(b) and 68, it must be asked whether obligations relating to human rights, as derived from the UN Charter, shall always prevail in situations of conflict with obligations under other international agreements.

This recognition of human rights in the 'world constitution' is confirmed by the International Court of Justice (ICJ).¹³ There are no rulings by any international court based on an application of Article 103 of the UN Charter in a dispute between human rights and other international norms not recognised by the Charter.

There can be no doubt that human rights per se are explicitly recognised in the Charter, and that the members of the UN shall work toward the promotion and observance of as well as the respect for human rights. At the same time, the paragraphs which address human rights also address the wider context of solving problems on a national and international level. This implies that treaties providing for international economic cooperation, as well as treaties promoting and protecting economic, social and cultural rights, are equally included.

Based on the wording of the Charter, it must be asked whether this recognition of human rights merely implies that the UN system has a mandate relating to promotion of human rights, or whether it also implies that substantial obligations on States are imposed by the UN Charter. If one chooses the latter understanding,

¹²⁾ Article 55 of the Charter reads "the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

¹³⁾ *Namibia (South West Africa)*, ICJ Reports 1971, p. 46, para. 92.

individual and specific rights, both those generally recognised at the time of the drafting of the Charter and those which have been subsequently recognised are within the scope of the UN Charter. If all human rights are explicitly recognised as falling within the scope of the UN Charter, and as Article 103 states that obligations under the Charter shall prevail over obligations of any other international agreement, this point is important.

The provisions of the UN Charter addressing human rights refer specifically to the United Nations and its bodies (General Assembly and Economic and Social Council). The fact that there are no references to the obligation of States per se to promote and respect human rights cannot be interpreted to imply that the United Nations member States are under no obligation with regard to human rights. Two authors of a widely recognised book in international law hold that the Charter also constitutes legal obligations for States, but they acknowledge that there are several scholars who disagree with this.¹⁴

As an argument against finding that the Charter imposes substantial obligations upon States, it must be emphasised that the UN Charter primarily addresses the UN system. At the same time, it is reasonable to state that in order for the United Nations to promote human rights, which is stated as one of its purposes, the States are under an obligation to observe this purpose in their own practice, and work toward the fulfilment of this purpose in the context of the United Nations.

Concerning the legal effect of the Charter and its provisions relating to human rights, the national courts have “differed markedly in their conclusions.”¹⁵ Some courts’ decisions made in 1947 considered that the provisions of the Charter are relevant in the sense that they form part of the public policy of the State as a signatory of the Charter, even if the provisions of the Charter were not considered to have binding effect.¹⁶

It is therefore found that there is no general agreement regarding the precise nature of the human rights obligations imposed by the UN Charter. Moreover, while the many references to human rights in the Charter should be noted, there is no explicit indication that these should stand out from the other areas of cooperation that are mentioned in the Charter. At the same time, the fact that human rights is recognised in Article 1(3) as one of the purposes of the UN must be

¹⁴ R. Jennings and A. Watts, *Oppenheim’s International Law*, 9th edition (Longmann, London and New York, 1992) p. 989, note 13.

¹⁵ *Ibid.*, p. 990.

¹⁶ *Ibid.*, p. 991. This is further elaborated upon: “The members of the United Nations are under at least a moral—and, however imperfect, a legal—duty to use their best efforts, either by agreement or, whenever possible, by enlightened action of their own judicial and other authorities, to act in support of a crucial purpose of the Charter.” *Ibid.*, p. 989.

acknowledged. Hence, it seems that “[t]he UN Charter does not resolve the question of hierarchy of law, or put differently, whether human rights law has primacy over other domains of international law.”¹⁷

One example will be provided. A potential consequence of applying Article 103 without limitations is that Article 55(a), stating, *inter alia*, that the United Nations shall promote full employment, implies that international treaties which address employment issues, directly or indirectly, should prevail over all other agreements. Several of the economic agreements which States have entered into might negatively affect this obligation to promote full employment—at least in the short-term.¹⁸ There is no doubt that these economic agreements are generally observed and respected—despite the fact that obligations relating to full employment of the Charter can be negatively affected.

Moreover, the Charter is first and foremost a constitution of the United Nations, establishing the UN as the dominant institution of all nations, identifying the organisation and purposes of the UN. Furthermore, the wording of the Charter falls short of meeting the requirements that human rights treaties must fulfil, namely those establishing clear corresponding obligations. The Charter does not contain any substantive obligations regarding human rights, except for the provisions relating to ‘studies’ and ‘commissions’ within the UN in Articles 13(1)(b), 62(2) and 68. The terms applied in Articles 1(3) and 55 (‘promote’, ‘respect’ and ‘observe’, the latter only applied in Article 55(c)) are relatively weak. These provisions, however, confirm that the UN system has a mandate relating to the promotion of human rights, which implies that UN member States are under an obligation to cooperate for this purpose.

Finally, while there is agreement that a distinction can be made between human rights giving rise to *jus cogens* norms on the one hand and ‘ordinary’ human rights on the other,¹⁹ there is nothing in the UN Charter which makes any distinction between human rights. In conclusion, it is therefore fair to state that the UN Charter is difficult to apply for solving potential conflicts between a UN human rights treaty and a WTO agreement.

¹⁷ See J. E. Alvarez, ‘How Not to Link: Institutional Conundrums of an Expanded Trade Regime’, 2:1 *Widener Law Symposium Journal* (2001) p. 9.

¹⁸ The WTO Agreement, bilateral trade agreements and agreements on economic restructuring are examples.

¹⁹ G. Marceau, ‘WTO Dispute Settlement and Human Rights’, 13 *European Journal of International Law* (2002) p. 798, says that the understanding that Articles 55 and 56 of the UN Charter cover “all human rights (and not only *jus cogens*) (...) is quite expansive.” She refers to a report on WTO and human rights by the Fédération Internationale des Ligues des Droits de l’Homme (FIDH).

Lex posterior: The *lex posterior* principle states that the most recent expression of State obligations in the form of a treaty ('legislative intent')²⁰ prevails over previous treaties. Article 30 of the Vienna Convention on the Law of Treaties regulates such situations. In addition to the requirement that the treaties must relate to the same subject matter (*ratione materiae*),²¹ there are two other basic preconditions which must be fulfilled for Article 30 to apply: the requirement that the treaties must be *successive* and the requirement that the treaties must apply to the *same treaty parties* (*ratione personae*).

The main rule is that in application of successive treaties relating to the same subject matter, the treaty that has been adopted more recently shall prevail in a situation of conflict between the treaties. It was found that the two treaties studied do relate to the same subject matter. The two treaties, however, cannot be considered to be successive, based on an understanding of the term successive: 'successive' means "following one another" or "following closely."²² As the two treaties are not successive, the *lex posterior* principle does not apply. It is therefore found that the *lex posterior* principle does not apply in solving potential conflicts between the Covenant and TRIPS.

Lex specialis: This principle is not recognised in the Vienna Convention on the Law of Treaties, nor is it found in other international treaties. The *lex specialis* principle is, however, generally considered to be the third principle for determining which treaty prevails in a situation of conflict between treaties. The ICJ has applied the *lex specialis* principle.²³ The principle is also included in the International Law Commission Draft Articles on State Responsibility.²⁴ Article 55 of the Draft Articles reads:

These articles does not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

²⁰ The 'legislative intent' is most appropriately expressed at the time of the adoption of the treaty. See *UN Conference on the Law of Treaties, Vol. II: Second Session, Vienna, 9 April–22 May 1969, Official Records* (1970), p. 253, where the expert consultant from the ILC Sir Humphrey Waldock says "that intention, as expressed in the later instrument, should therefore be taken as intended to prevail over the intention expressed in the earlier instrument. That being so, it was inevitable that the date of adoption should be the relevant one."

²¹ Pauwelyn, *supra* note 8, p. 364: "If there is a conflict, the two treaties necessarily relate to the same subject matter."

²² *Oxford New Dictionary of English* (2001).

²³ *Ambielos*, ICJ Reports 1952, p. 44, and *Gabcikovo-Nagymaros*, ICJ Reports 1997, p. 76, para. 132.

²⁴ The proposed Draft Articles of 2001, *Report of the International Law Commission: Fifty-third Session (23 April–1 June and 2 July–10 August 2001)*, UN Doc. A/56/10, are the result of several decades of discussion in the ILC. The Draft Articles do not have any legal status, but present a contemporary understanding for the interpretation of public international law, written by some of the most prominent experts of international law. The Draft Articles presented by the ILC deal only with remedies where an internationally wrongful act has been committed.

While Article 55 is specifically related to wrongful acts implying international responsibility, the general principle is relevant. The principle of *lex specialis* in public international law states that if all parties to a treaty conclude a more specialised treaty, the provisions of this latter treaty prevail over those of the more general treaty, owing to the fact that they reflect more precisely the consent or expression of will of the relevant State parties.²⁵

It is not always obvious which of two treaties is more special of the two. Both the *subject matter* under consideration, which *legal rules* that are best at solving the matter, and which *body* is mandated to answer the question²⁶ could impact on the finding of which treaty is *lex specialis*.

The concrete application of the principle of *lex specialis* in order to solve conflicts in the applicable law is still uncertain. The principle is recognised by the WTO Secretariat, but this does not imply that such understanding is approved by the WTO member States. The WTO Secretariat writes:

According to a widely held view in the CTE,²⁷ trade measures that parties to a multilateral environmental treaty have agreed, could be regarded as ‘*lex specialis*’, prevailing over WTO provisions. They therefore ought not to give rise to legal problems in the WTO—even if the agreed measures are inconsistent with WTO rules. However, this is not a definitive interpretation, and numerous uncertainties remain.²⁸

As stated by the WTO Secretariat, this is not a “definitive interpretation”, and a view expressed by a secretariat cannot be considered as an authoritative interpretation. Nevertheless, this acknowledgement of a widely held view by WTO member States regarding environmental law as *lex specialis* in relation to WTO law must be noted.

The *lex specialis* principle is generally recognised as one of three principles for solving conflicts between two rules of international law. The concrete application of this principle, however, is restricted by the limited jurisdiction of most international bodies which are mandated to monitor the implementation of and adopt interpretations of treaties, as this mandate does not extend to apply to other treaties. Therefore, this principle should be applied with caution.²⁹ Only

²⁵ Pauwelyn, *supra* note 8, p. 387.

²⁶ Marceau, *supra* note 19, p. 761, states that it is “possible to envisage that a human rights forum would reach a conclusion that a measure (that is also (part of) a WTO measure) is inconsistent with a human rights treaty, while the WTO adjudicating body would conclude that the same measure is consistent with the WTO treaty.”

²⁷ Committee on Trade and Environment.

²⁸ WTO Secretariat briefing: *Environment: CTE Agenda Part 1: CTE on: Trade Rules, Environmental Agreements and Disputes*, <www.wto.org/english/tratop_e/envir_e/cte01_e.htm>, visited on 2 June 2006. This briefing does not have any legal status.

²⁹ Pauwelyn, *supra* note 8, p. 438, concludes that only in case the *lex posterior* principle does not apply there should be a recourse to *lex specialis*: “Even if an earlier treaty is *lex specialis* vis-à-vis the latest expression [of State intent], *this latest expression should prevail*”, emphasis added.

the ICJ is formally mandated to consider the relationship between two treaties which are allegedly incompatible.

4. *Obligations Erga Omnes*

It has been found that the established means for solving conflicts between treaties are not necessarily applicable in order to determine which of the two treaties, the Covenant or TRIPS, is to prevail in a situation of conflict.

At the same time, treaties of a particular nature seeking to protect ‘vital matters’³⁰ must be considered to have a certain weight. The analysis below will be on a principal level, but the findings will also be applied specifically to the Covenant and TRIPS. In other words, somewhere between the *jus cogens* norms—making void all treaties which include provisions conflicting with such norms—and the basic assumption of a lack of hierarchy in international law there might be certain approaches which merit further attention.³¹

Four elements will be included in this section on obligations *erga omnes*. First, an analysis of the requirements for establishing obligations *erga omnes*. Second, an assessment of obligations *erga omnes* in the context of human rights, particularly the right to food. Third, a similar assessment of obligations *erga omnes* in the context of TRIPS, relating to the substantive standards established. Fourth, the legal effects of identifying obligations *erga omnes*.

4.1. Requirements for Establishing Obligations Erga Omnes

The *Barcelona Traction* case introduced the principle of obligations *erga omnes*.³² This principle recognises obligations which are “owed to the international community as a whole, with the consequence that all States in the world have a legal interest in the compliance with the obligation.”³³ The ICJ included aggression, genocide, slavery and racial discrimination as well as “the principles and rules concerning the basic rights of the human person”³⁴ as examples of obligations

³⁰ *Yearbook of the International Law Commission*, vol. 2 (1966) p. 217, para. 13.

³¹ As will be clearer below, the term ‘principle’ is applied with regard to ‘obligations *erga omnes*’ as this is an established legal principle, while the term ‘approach’ is applied with regard to ‘multilateral obligations’ as this is not in the same manner an established legal principle.

³² *ICJ Reports* 1970, pp. 33, 34, paras. 33–35. In *Barcelona Traction*, which gave rise to the obligations *erga omnes*, the issue considered by the ICJ was whether Belgium could bring a claim against Spain, complaining on behalf of Belgian shareholders against general measures introduced by Spain against the Barcelona Traction Company. The question (at para. 35) was: “Has a right of Belgium been violated on account of its nationals’ having suffered infringements . . .” This was therefore an issue of diplomatic protection, in which the Belgian capacity to bring such a claim was dependent upon whether such a right existed.

³³ *Report by ILC Special Rapporteur James Crawford*, A/CN.4/507, 2000, para. 106(a).

³⁴ *Barcelona Traction*, *supra* note 32, p. 33, para. 34.

erga omnes.³⁵ While the act of aggression must be primarily considered as giving rise to *erga omnes* obligations with regard to other States, the other obligations give rise to obligations *erga omnes* that apply particularly to human beings.

Hence, a distinction can be made between obligations *erga omnes* which seek to protect the interests of other States, and obligations *erga omnes* which seek to protect human beings directly.³⁶ Below, focus will be on those obligations *erga omnes* which derive from the basic rights of the human person, and not those obligations which seeks to protect the interests of States. In this context, it must be emphasised that the same ICJ ruling which introduced the obligations *erga omnes* principle also states that “the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality.”³⁷ This premise only repeats the basic idea of human rights protection, namely that it is the State which has human rights obligations with respect to all persons within its jurisdiction,³⁸ and that these obligations cannot be transferred to others.

Under which circumstances will the lack of observance and fulfilment of obligations by one State give rise to a legal interest by the international community of States? Until now, the practice of the ICJ or other international courts has not established a firm principle regarding the seriousness of the disrespect of the obligations. It is therefore reasonable to conclude that while the principle of obligations *erga omnes* is generally accepted, the principle is not sufficiently specified and clear.

Acknowledging this uncertainty, the present author finds that there are three conditions which must be fulfilled for an obligation *erga omnes* to apply. First, a State violates its legal obligations. Second, this disrespect of the obligation must take place on a certain scale, in other words in a grave and systematic manner. Third, the consequences of acting in disrespect with its legal obligation are of such a nature that the international community of States has a legal interest in ensuring compliance.³⁹

³⁵ In addition to obligations *erga omnes*, the International Law Commission has introduced another set of obligations, namely obligations *erga omnes partes*, whose obligations extend only to the other parties of an international treaty, often a regional treaty (‘group of States’). See *Report of the International Law Commission*, *supra* note 24, pp. 320, 321. Another term is also applied, namely *inter omnes partes*. See Simma, *supra* note 3, p. 338. He notes (at p. 370) that “the *omnes*, however, [is] limited in our present context to the circle of the other contracting parties.” As obligations *erga omnes* are more recognised in international law than obligations *erga omnes partes*, this analysis will relate to the former.

³⁶ Simma, *ibid.*, p. 319. See also I. D. Seidermann, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia, Hart, Antwerpen, Groningen, Oxford, 2001).

³⁷ *Barcelona Traction*, *supra* note 32, p. 47, para. 94.

³⁸ With the possible exception relating to economic rights for non-nationals in accordance with Article 2(3) of the International Covenant on Economic, Social and Cultural Rights.

³⁹ See *Report of the International Law Commission: Fifty-seventh Session (2 May–3 June and 11 July–5 August 2005)*, UN Doc. A/60/10, 2005, p. 225, para. 492: “[O]bligations *erga omnes* [are] related to the

The most interesting question for the purpose of this thesis is to identify if obligations that fall outside of the scope of *jus cogens* norms, which is a restrictive category,⁴⁰ *can nevertheless give rise to obligations erga omnes*. This will be analysed below in the context of the human right to food as well as TRIPS.

4.2. Obligations Erga Omnes and Human Rights, Particularly the Right to Food

Are human rights which falls outside of *jus cogens* norms nevertheless within the scope of obligations *erga omnes*?⁴¹ This question is very different from other categorisations between ‘fundamental’ and ‘ordinary’ human rights.⁴²

For the purpose of this thesis it will be analysed whether obligations *erga omnes* apply to the right to food. On the one hand, there can be no reason to claim that

opposability of the obligations to all States, in particular the right of every State to invoke their violation as a basis for State responsibility.” See also Article 33(1) of the ILC’s Draft Articles on State Responsibility: “The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation, and on the circumstances of the breach”, emphasis added. Also Article 48 of the Draft Articles on State Responsibility (‘invocation of responsibility by a State other than an injured State’) is an obligation *erga omnes* provision.

⁴⁰ The understanding of obligations *erga omnes* is close to *jus cogens* norms, from which no derogation is permitted, is expressed in the Report by ILC Special Rapporteur James Crawford, *supra* note 33, para. 106(a). See also Simma, *supra* note 3, p. 300. This view of what constitutes obligations *erga omnes* must be questioned, and it is not in conformity with what other authors have written about obligations *erga omnes*. See Report of the International Law Commission: Fifty-second Session (1 May–9 June and 10 July–19 August 2000), UN Doc. A/55/10, p. 40, para. 122.

⁴¹ The International Law Commission’s Draft Articles on State Responsibility had deleted the previous references to human rights in the earlier drafts. In Article 40(2)(e)(ii) of the 1996 draft, only human rights were specified, and no other reference to a particular system of law is found. In its commentary to Article 40(2)(e)(iii), the ILC stated: “The interests protected by such provisions are not allocatable to a particular State.” See *Yearbook of the International Law Commission*, vol. 2 (1985) p. 27, para. 20. The 2001 Draft did not make any specific references in Articles 42 and 43 (replacing the previous Article 40). See Report of the International Law Commission, *supra* note 24, pp. 294–304. These Draft Articles are based on obligations *erga omnes* (see Report of the International Law Commission, *ibid.*, pp. 38–48), but the deletion might qualify the position that obligations derived from human rights are the only categories of obligations over which all other States have a legal interest. The reference to human rights was deleted in the ILC’s Fourth Report on the Draft Articles on State Responsibility, presented for the UN General Assembly in 2001, as “[i]t singled out human rights for special treatment in vague and overly broad terms and in a way that conflicted or overlapped with other aspects of the definition.” See Crawford *et al.*, The ILC’s Draft Articles on State Responsibility: Toward Completion of a Second Reading’, 94 *American Journal of International Law* (2000) p. 666. The lack of explicit references to human rights violations in the Draft Articles on State Responsibility has been criticised by Tomuschat, ‘General Course on Public International Law’, 281 *Recueil des cours* (1999–VI) (Hague Academy of International Law, Martinus Nijhoff Publishers, The Hague, Boston, London, 2001) p. 295.

⁴² See *Austria v. Italy*, 1961, Case 788/60, in 4 *Yearbook of the European Convention on Human Rights* (1961) p. 116, where the European Human Rights Court pointed to the “objective character of human rights treaties, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves”, p. 140, emphasis added.

the international community of States does not have a common legal interest to bring an end to a situation in which there are serious violations of social human rights under which a great number of people suffer. A situation in which segments of the population are directly or indirectly denied access to crucial human rights such as food, so that the right to food is so insufficiently enjoyed to the extent that thousands of lives are threatened, is a concern for all other States. These are basic rights of the human person to which all States have a legal interest in all other States' consistent compliance.

On the other hand, it can be more difficult to identify the responsibility of the State for the existence of a serious situation of non-fulfilment of social human rights. While a situation of widespread torture and disappearances is clearly falling under a State's responsibility, a situation of widespread hunger can be the result of several factors, not all of them being under the State's control. Therefore, the acts of omission or acts of commission must be specifically identified when the international community addresses a hunger situation in a State.

Therefore, it seems that obligations *erga omnes* arise in certain situations of *serious violations of economic, social and cultural rights*. The legal interest of other States in the fulfilment of obligations must be considered to be more substantial in situations showing a serious lack of enjoyment of recognised human rights. Moreover, the right to be free from hunger is the only substantial human right recognised in the Covenant which is explicitly said to be 'fundamental'.

Moreover, States should always observe all their human rights obligations when implementing measures to promote certain human rights, and apply the principle of 'the most-favourable provision'.⁴³ In addition to Article 4 of the Covenant, there are other provisions of international human rights treaties. Article 60 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that:

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

This Article refers to 'any of the human rights under any other agreement'. The European Convention *per se* does not extend to the right to food, but the formulation must be interpreted to imply that Article 60 applies generally, and not only to civil and political rights.

An author discussing the principle of obligations *erga omnes* reaches the same conclusion. He admits that international judicial and lawmaking organs have not

⁴³ On the most-favourable provision (the provision which gives the best protection to the human being), see S. A. Sadat-Akhavi, *Methods of Resolving Conflicts Between Treaties* (Martinus Nijhoff Publishers, Leiden and Boston, 2003) ch. 7.

been able to fulfil the potential of such obligations due to reluctance among the States. He continues: “[T]he doctrine should not be undercut by any tendency to segregate particular ‘basic’ or ‘fundamental’ rights from the full corpus of rights existent under general international law.”⁴⁴ Moreover, “it is inappropriate to divide human rights norms into those which entail obligations *erga omnes* and those which do not ...”.⁴⁵

The arguments that human rights is an issue belonging exclusively to the domestic jurisdiction of States have been convincingly challenged, and presently are generally not accepted. A situation in which social human rights are threatened in one country challenges the international community to assist in enabling the respective States to work toward the fulfilment of these human rights.

The specific nature of human rights treaties, which is substantially different from most other treaties applicable in the relations between States, must be considered the main argument for considering basic human rights to impose obligations *erga omnes*. Not all aspects of the right to food must be considered to impose obligations *erga omnes*, but *primarily those related to the measures for the distribution of food, in situations of an enduring food shortage*.⁴⁶

In this context, it is not considered fruitful to analyse the statement of an author claiming that “most obligations in human rights treaties might be seen as falling into the class of ‘integral’ obligations.”⁴⁷ The basis for giving rise to obligations *erga omnes* is that the State has acted—or failed to act—in a manner resulting in an appalling situation, implying that there is a gross and systematic failure by the State to fulfil its obligations. Based on this principle, economic, social and cultural human rights might also give rise to obligations *erga omnes*. The right to food is an example of a human right which can give rise to obligations *erga omnes*.

4.3. Obligations Erga Omnes in the Context of WTO and TRIPS

It has been acknowledged that ordinary WTO obligations are not of such a kind that all States have a legal interest in the compliance with these obligations. As an example, the USA has stated:

The concept *erga omnes* is squarely at odds with the fundamentally bilateral nature of WTO and GATT dispute settlement and with the notion that WTO disputes concern

⁴⁴ Seiderman, *supra* note 36, p. 289.

⁴⁵ *Ibid.*, p. 124.

⁴⁶ Moreover, when a government has asked the international community for assistance in times of famine and starvation, the suffering people should expect to be provided with food. Furthermore, if the State facing severe food shortage for its vulnerable population refuses to cooperate with the international community in order to have food provided, this would most certainly constitute non-compliance with the right to food.

⁴⁷ Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’, 95 *American Journal of International Law* (2001) p. 549, emphasis added.

nullification and impairment of negotiated benefits to a particular Member. WTO adjudicators are tasked with resolving disputes between specific complaining and defending parties. Adjudicators may not, through improper importation of the concept *erga omnes*, enforce WTO obligations on behalf on non-parties to a dispute.⁴⁸

The interesting question is whether this observation that the dispute settlement under WTO is of a ‘fundamentally bilateral nature’, is correct with regard to all WTO agreements and in all situations. While WTO agreements prohibit unjustified or arbitrary discrimination between goods, services and intellectual property holders of domestic and foreign origin, these agreements are diverse, and TRIPS is the most prominent example of a ‘standard-setting’ or ‘lawmaking’ treaty.⁴⁹

The analysis will be based on three reports from the Appellate Body. Based on these findings, an analysis specifically regarding TRIPS will be provided. It will be analysed whether these examples imply obligations *erga omnes*.

First, it should be observed that a dispute settlement panel has accepted–endorsed by the Appellate Body—that member States which are not major producers of a particular product can also bring a trade dispute relating to this product to the dispute settlement system as “any deviation [is likely] . . . to affect them, directly or indirectly.”⁵⁰ The Appellate Body did not find that case law from the Permanent Court of International Justice/ICJ establishes as a general rule that “a complaining party must have a ‘legal interest’ in order to bring the case.”⁵¹ This indicates that less-affected parties might also be found eligible to bring a case.

This principle has been extended as a result of the following: In *US–Line Pipe*, a non-developing country (South Korea) successfully brought a claim against the USA for its failure to treat developing countries differently from industrialised countries under the Safeguard Agreement.⁵² In *US–Section 211 Appropriations Act*, the European Community (EC) was allowed to bring a complaint against the USA for certain provisions in the US intellectual property legislation which

⁴⁸ US statement at a meeting on 7 May 2003 in which it presented its reactions to the decision in paragraph 6.10 by the Arbitrators in WT/DS108/ARB (*US–Foreign Sales Corporations*), <www.us-mission.ch/press2003/0507DSB.html>, visited on 2 June 2006.

⁴⁹ On the distinction between *lawmaking* and *contractual* treaties, see Wolfrum and Matz, *supra* note 5, pp. 131–133.

⁵⁰ WT/DS27/AB/R (*EC–Bananas*), para. 136.

⁵¹ *Ibid.*, para. 133. Pauwelyn, *supra* note 8, pp. 81–85, finds that the term ‘legal interest’ as applied by the Appellate Body, is not adequately precise. Rather, he establishes two conditions for legal standing to be established. First, in the context of WTO, addressing trade-restricting measures inconsistent with one or more of the WTO agreements, the trade of a particular WTO member State must—at least in theory—apply to the trade of the member bringing the case. Second, the State must prove that it is potentially-affected by the measure, directly through trade or otherwise, including the effects of increased prices on the world market (trade opportunities, not trade effects). Therefore, as these two conditions must be met, a “purely ‘legal interest’ is not enough” in order for standing to be established. Pauwelyn, *supra* note 8, p. 83, footnote omitted.

⁵² WT/DS202/AB/R, paras. 120–133.

were discriminatory against Cuban citizens.⁵³ The EC was not directly affected by this legislation, but the USA did not object to the fact that the EC made its claims before the WTO dispute settlement system, and subsequently won the case.⁵⁴

These three examples illustrate that a State which does not have any specific economic interest can also bring a case before the WTO's dispute settlement system. An explanation is that the defending parties have not presented objections to the fact that the case is brought by States other than the directly-affected State. Moreover, the dispute settlement system seems to consider that these cases address certain issues which are found to be of importance for the WTO as such to clarify—and confirm—certain principles of favourable treatment and discrimination.

An additional interpretative material relevant to the dispute settlement system will be included. GATT 1994 Article XXIII:1 on 'nullification or impairment' reads:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that *the attainment of any objective of the Agreement is being impeded*. . .⁵⁵

Hence, the legal interests extend to whether the attainment of the objective is being impeded. This indicates a strong legal interest in compliance with the obligations.

Moreover, while TRIPS is setting out minimum standards for the protection of trade-related intellectual property, TRIPS is a standard-setting agreement. Implementation of TRIPS in accordance with its provisions is an obligation of all WTO member States. There are different positions with regard to the desirability of introducing the same standards in industrialised and developing States, but WTO member States have a legal interest in other States' compliance with the TRIPS requirements.

Does this qualify for establishing obligations *erga omnes*? The three requirements introduced at the introduction of this section (violates its legal obligations; grave and systematic manner; serious consequences) imply that there are certain requirements for establishing obligations *erga omnes*. Moreover, the legal interests must be claimed by all States. Those States which are not parties to the WTO

⁵³ WT/DS176/AB/R, paras. 273–296.

⁵⁴ As an argument against this reasoning, Pauwelyn, *supra* note 8, p. 85, holds that this "would only mean that WTO members can, in certain circumstances, exercise the *rights of other members*, not that breach of any WTO rule by any WTO member creates an *individual right for each and every other WTO member*."

⁵⁵ Emphasis added. Parts of Article XXIII are controversial, in particular Article XXIII:1(b) on non-violation, implying that a WTO member State can also bring a case before the dispute settlement system also if there has been no direct violation of any of the specific provisions.

cannot generally be claimed to have so strong legal interests in a State's compliance with the TRIPS obligations that this establishes obligations on the level of *erga omnes*.⁵⁶

Therefore, while it must be emphasised that also State parties which are not directly affected by the trading practice in another State can bring this trading practice before the WTO's dispute settlement system, it is not found that this constitutes legal interests of a kind which imply that obligations *erga omnes* are established.⁵⁷ At the same time, the WTO constitutes more than merely 'contractual treaties'. Moreover, while there are usually only two parties to a WTO dispute, the nature of the dispute is not 'fundamentally bilateral' as claimed by the USA.

4.4. The Legal Effects of Identifying Obligations *Erga Omnes*

While obligations *erga omnes* imply that other States have a legal interest in a State's compliance with its obligations, it must initially be stated that obligations *erga omnes* are first and foremost of a procedural nature to determine when other States have legal interests in one State's compliance.⁵⁸ *Barcelona Traction* introduced an essential distinction between obligations of a State toward the international community as a whole, and obligations arising *vis-à-vis* another State in the field of diplomatic protection. In the latter case, *a State must first establish its right to bring a claim* against another State.⁵⁹

To determine the legal effects, one must start from this basic understanding. Based on obligations arising from the right to food in a situation where the State bears a substantial responsibility for a situation with a high number of starving persons this can give rise to obligations *erga omnes*.

The ILC's Study Group on Fragmentation of International Law has observed: "[O]bligations *erga omnes* were more concerned with the scope of the application of norms, rather than hierarchy."⁶⁰ Hence, the norms giving rise to obligations *erga omnes* apply generally, and the States do not have to establish that they have a right to bring a claim or complaint. Unlike *jus cogens* norms, which are substantive

⁵⁶ Whether the other WTO members might have obligations *erga omnes partes*, see *Report of the International Law Commission*, *supra* note 24, pp. 320, 321, is a question which will not be elaborated further as obligations *erga omnes partes* are even more weakly founded in international law than obligations *erga omnes*.

⁵⁷ Therefore, the fact that the WTO's adjudicating bodies apply a broad approach to the question of standing, as identified by Tams, *supra* note 2, p. 121, is not in itself enough to conclude that the WTO Agreement gives rise to obligations *erga omnes*.

⁵⁸ See Seiderman, *supra* note 36, p. 125: "Obligations *erga omnes* (...) are not themselves primary or substantive rules of international law, but are rather obligations that give rise to certain legal consequences, or secondary rules of international law."

⁵⁹ *Barcelona Traction*, *supra* note 32, p. 33, para. 34.

⁶⁰ *Report of the International Law Commission*, *supra* note 39, p. 223, para. 488. See also Articles 33(1) and 48 of the Draft Articles on State Responsibility.

norms with specific legal effects, the same effects do not apply to obligations *erga omnes*.

The identification that certain rights gives rise to obligations *erga omnes* does not determine that the treaty in which these human rights are recognised must always prevail over other treaties. However, in order to clarify the relationship between a human rights treaty and a treaty which merely provides for bilateral concessions between States (contractual treaties), the fact that the human rights treaty gives rise to obligations *erga omnes* can be an element in the legal reasoning, as human rights norms do have a special status in international law.

5. *The Approach of Multilateral Obligations*

The approach of multilateral obligations has recently been introduced in the academic literature, as well as in the context of the ILC's Draft Articles on State Responsibility.⁶¹ Initially it must be noted that multilateral obligations is wider and less established as a legal concept than obligations *erga omnes*. Multilateral obligations imply that *two or more parties to a treaty giving rise to such obligations can not modify or otherwise change the treaty*.⁶² Conversely, a treaty giving rise to bilateral obligations can be modified as a result of an agreement between two or more parties to the treaty.

This section will analyse whether the development and application of multilateral obligations are relevant as a supplement to obligations *erga omnes* in identifying distinctions between human rights treaties and other treaties. Among such other treaties, WTO agreements will in particular be analysed. Stated differently: Does an appropriate understanding of multilateral obligations imply that human rights treaties give rise to multilateral obligations, and hence shall be given particular weight?

An author addressing obligations arising under WTO law and human rights law claims: "The standard example of [multilateral] obligations are those arising under a human rights treaty [whereas] ... WTO obligations remain essentially of

⁶¹ See in particular *Report of the International Law Commission*, *supra* note 40, ch. IV. See also C. Tomuschat, 'Obligations for States', 241 *Recueil des cours* (1993–IV) (Hague Academy of International Law, Martinus Nijhoff Publishers, The Hague, Boston, London, 1994); J. A. Frowein, 'Reactions by Not Directly Affected States', 248 *Recueil des cours* (1994–IV) (Hague Academy of International Law, Martinus Nijhoff Publishers, The Hague, Boston, London, 1995); Simma, *supra* note 3; and Pauwelyn, *supra* note 8, ch. 2.

⁶² S. Kirchner, 'Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?', 5 *German Law Journal* (2004) p. 59. Although he applies the terms 'constitutional' and 'non-constitutional', it is obvious that the legal effects are similar. Other terms applied are 'lawmaking' and 'contractual'. Initially, it must be emphasised that this analysis is dealing with multilateral obligations, not multilateral treaties.

a bilateral type; they are not collective in nature.”⁶³ An alternative position is that a standard-setting treaty such as TRIPS is of a more collective nature. The WTO is analysed at the end of this section, but first there is a need to give more clarity to the concept and its application.

5.1. The Concept

The concept of multilateral obligations is not an established legal concept.⁶⁴ Furthermore, it is important to note that the attempt to introduce a distinction between treaty obligations of a *reciprocal*, *interdependent* and *integral* nature⁶⁵ in the Vienna Convention on the Law of Treaties did not succeed. Therefore, with the exception of *jus cogens* norms, no hierarchy exists. The fact that this categorisation was not subsequently proposed by the ILC implies that there exist reasons to be cautious about introducing new concepts which could be understood as an introduction of a new hierarchy in international law.

⁶³ Pauwelyn, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’, 14 *European Journal of International Law* (2003) p. 907, *see also* pp. 930–936, in which he first identifies four reasons why WTO obligations should be considered bilateral obligations: trade as the object for negotiations; WTO is dominated by a bilateral approach, which is later ‘multilateralised’ and ‘collectivised’; the objective of WTO obligations can be individualised and reduced to the relation between two States; and only the complainant State is allowed to suspend its obligations *vis-à-vis* the State which has been found to be in non-compliance with WTO obligations. He also (at pp. 936–941) finds three reasons in support of a development toward considering at least some WTO obligations as closer to ‘collective’ (multilateral) obligations. These are: increased emphasis on economic interdependence; new themes, in which WTO obligations also extend to individuals, not only to States; and the more regulatory nature of these new WTO treaties. Pauwelyn finds (at p. 945) that TRIPS, ‘of all WTO obligations, is the most regulatory in type ...’.

⁶⁴ C. Dominicić, ‘The International Responsibility of States for Breach of Multilateral Obligations’, 10 *European Journal of International Law* (1999) p. 354.

⁶⁵ *Yearbook of the International Law Commission*, vol. 2 (1958) pp. 27, 28. The discussion continued in the ILC until their final draft was adopted in 1966. In the Commentary to Article 30 of the final draft (then Article 26), the ILC stated: “[N]one of the forms of clause asserting the priority of a particular treaty over other treaties requires to be dealt with specially in the Article except Article 103 of the Charter. It considered that the real issue, which does not depend on the presence or absence of such a clause, is *whether the conclusion of a treaty providing for obligations of an ‘interdependent’ or ‘integral’ character affects the actual capacity of each party unilaterally to enter into a later treaty derogating from these obligations or leaves the matter as one of international responsibility for breach of the treaty.*” (The ILC preferred the latter option.) *See Yearbook of International Law Commission*, *supra* note 30, p. 216, para. 8, emphasis added. In a footnote, the definitions provided by Fitzmaurice were spelled out with examples: *Interdependent* treaties are treaties in which “the violation of its obligations by one party *prejudices the treaty regime applicable between them all* and not merely the relations between the defaulting State and the other parties.” *Integral* treaties were defined as treaties in which the “obligation is self-evident, absolute and inherent for each party, and *not depending on a corresponding performance by the others*” and include ‘human rights conventions’. *See Yearbook of the International Law Commission*, vol. 2 (1958) pp. 27, 28, emphasis added. *See also Yearbook of the International Law Commission*, *supra* note 30, p. 217, para. 13, considering human rights as a ‘vital matter’. Also in 1963 and 1964, the ILC dealt with interdependent and integral treaties, *see Yearbook of the International Law Commission*, vol. 2 (1963) p. 39, para. 17, and *Yearbook of the International Law Commission*, vol. 2 (1964) pp. 58–60, paras. 22–30.

No substantial efforts have been made to clarify the distinction between multilateral obligations and obligations *erga omnes*, and between multilateral obligations and the ‘international crimes of States’, as introduced and defined in the Draft Articles on State Responsibility.⁶⁶ Such uncertainty regarding the scope of the concept of multilateral obligations should, however, not prevent one from analysing obligations imposed by human rights treaties versus obligations imposed by economic law treaties.

Moreover, the term ‘multilateral obligations’ is distinct from obligations *erga omnes* as the latter must be narrowly understood, while the former has a wider application.⁶⁷ The ILC, however, has not presented a definition distinguishing multilateral obligations clearly from obligations *erga omnes*.⁶⁸

5.2. The ILC’s Distinctions

There are three processes within the International Law Commission which will be analysed in order to reach a better understanding of the term ‘multilateral obligations’: the elaboration on the law of treaties; the Draft Articles on State Responsibility; and the elaboration on fragmentation of international law.

An attempt at distinguishing between international law treaties was made in Fitzmaurice’s report to the ILC in 1958, elaborating on three proposed categories of treaties, categorised by the nature of their obligations: integral treaties, interdependent treaties and reciprocal treaties.⁶⁹

Regarding treaties of the integral type, “the force of the obligation is self-evident, absolute and inherent for each party, and *not depending on a corresponding*

⁶⁶ A link between obligations *erga omnes* and State responsibility is made in *Report of the International Law Commission*, *supra* note 39, p. 225, para. 492: “[O]bligations *erga omnes* [are] related to the opposability of the obligations to all States, in particular *the right of every State to invoke their violation as a basis for State responsibility*”, emphasis added. Simma, *supra* note 3, p. 309, discussing the term ‘international crimes of States’, finds that the introduction of this term has led to confusion in relation to the more established concepts of *jus cogens* norms and obligations *erga omnes*.

⁶⁷ The present author finds that the main difference between obligations *erga omnes* and multilateral obligations is that the former strictly apply to the internal jurisdiction of the State, while the latter have a stronger external dimension. Moreover, multilateral obligations must be considered to be more enduring obligations not only relating to particularly serious incidents, while the establishment of obligations *erga omnes* are identified by balancing various provisions of the relevant treaties. Furthermore, no court ruling is necessary in order to establish this obligation. Unlike obligations *erga omnes*, the distinction between bilateral and multilateral obligations is not recognised as a codified rule of international law.

⁶⁸ Within the context of the Draft Articles on State Responsibility, the ILC (*supra* note 40, pp. 42, 43) distinguished between the “State injured by an internationally wrongful act of another State and (...) the State which had a legal interest in the performance of an international obligation without being directly injured ...”. This latter is an understanding which is almost identical to obligations *erga omnes*. See also Article 48 (‘invocation of responsibility by a State other than an injured State’) of Part III (‘implementation of the international responsibility of a State’) of the Draft Articles on State Responsibility, Article 33(1) of Part II (‘content of the international responsibility of a State’).

⁶⁹ *Yearbook of the International Law Commission*, *supra* note 65, pp. 27, 28.

*performance by the others.*⁷⁰ The Convention Against Genocide is one example. Treaties with interdependent obligations are treaties in which the breach of one of the treaty obligations by one party “*will justify a corresponding non-performance*” by the other parties.⁷¹ Disarmament treaties give rise to such interdependent obligations. Treaties with reciprocal obligations are of the kind that only affect the relationship of the parties to a treaty. Treaties regulating bilateral diplomatic relations are one example. These distinctions were not proposed in later ILC drafts on the law of treaties.

The second relevant process is the drafting of the Draft Articles on State Responsibility. While the Draft Articles themselves do not explicitly use the term ‘multilateral obligations’, *the report by the Special Rapporteur introduced the distinction between multilateral and bilateral obligations.*⁷² The subsequent discussion emphasised Article 60 of the Vienna Convention on the Law of Treaties (‘termination or suspension of the operation of a treaty as a consequence of its breach’).

Treaties where “performance of the obligations of a treaty is owed to the parties to the treaty”⁷³ stand out from other treaties. Moreover, “[i]t will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes.”⁷⁴ The term ‘multilateral obligations’ encompasses hence both integral and interdependent obligations.

Human rights treaties are not addressed in this context. Human rights, however, are recognised in another provision of the ILC’s Draft Articles on State Responsibility. The obligations recognised under Article 50(1) (‘obligations not affected by countermeasures’)—of which *fundamental human rights* obligations are part—must be considered to be multilateral obligations of an integral nature.⁷⁵

Third, the ILC has recently also applied the term ‘absolute obligations’ in the context of human rights,⁷⁶ in a study on Article 41 on the Vienna Convention on the Law of Treaties (‘agreements to modify multilateral treaties by certain of the parties only’). A distinction is made between treaties laying down reciprocal

⁷⁰ *Ibid.*, p. 28, emphasis added.

⁷¹ *Ibid.*, p. 27, emphasis added.

⁷² See *Report by ILC Special Rapporteur James Crawford*, *supra* note 33, paras. 99–108.

⁷³ *Report of the International Law Commission*, *supra* note 24, p. 297.

⁷⁴ *Ibid.*

⁷⁵ Article 50(1) prohibits the taking of countermeasures affecting: a) obligations to refrain from the use of force; b) obligations for the protection of fundamental human rights; c) obligations of a humanitarian character prohibiting reprisals; d) other obligations under pre-emptory norms under general international law. See *ibid.*

⁷⁶ *Report of the International Law Commission: Fifty-sixth Session (3 May–4 June and 5 July–6 August 2004)*, UN Doc. A/59/10, 2004, p. 297, footnote 640, which reads: “A human rights treaty gives rise to absolute obligations. The obligations it imposes are independent and absolute and performance of them is independent of the performance by the other parties of their performance.”

obligations, which can be modified, and treaties containing interdependent or absolute obligations, under which the “power of modification is limited.”⁷⁷

This demonstrates that the distinction between treaties based on their character still has some resonance in the International Law Commission. Treaties which give rise to multilateral obligations—owed to the other parties to a treaty—are seen as being of a special nature. At the same time, there is no basis for claiming that the International Law Commission has made any deliberate efforts to clarify the term ‘multilateral obligations’.

Moreover, there is no consistent application of terms in the three processes involving the ILC. One general principle can be derived from the reports analysed: members of the ILC still finds that a distinction can be made between integral and interdependent obligations on the one hand, and reciprocal obligations on the other. While the two former are similar to multilateral obligations, the latter must be considered to be obligations of a bilateral kind.

5.3. Distinction Made in the Vienna Convention on the Law of Treaties

To which extent the Vienna Convention identifies certain treaty obligations which stand out from other treaty obligations, in addition to the *jus cogens* norms of Articles 53 and 64, will now be analysed.

There is one provision which is a remnant from the category of interdependent treaties. This is Article 60(2)(c), relating to *performance of obligations*:

If the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

This provision emphasises the performance of obligations under the treaty, hence relating to interdependent obligations. As already shown, disarmament treaties gives rise to such obligations. As this does not establish the basis for distinguishing treaties, this paragraph will not be analysed further.

Article 60 includes another paragraph which can be considered as confirming that there are certain obligations relating to the protection of the human beings, in addition to *jus cogens* norms, which stands out from the other paragraphs. This is Article 60(5) on the *protection of the human person*.⁷⁸ This paragraph

⁷⁷ *Ibid.*

⁷⁸ It is evident that treaties of a humanitarian character stand out from other treaties. In *Reservations to the Genocide Convention*, the representative from the United Kingdom made one of the strongest arguments before the International Court of Justice that there is a difference between treaties of a social and lawmaking type on the one hand, and treaties providing for the exchange of reciprocal benefits and obligations on the other. See *ICJ Reports* 1951, pp. 378–383. In a separate opinion of Judge Weeramantry in *Application of the Genocide Convention*, *ICJ Reports* 1996, p. 640, the humanitarian and human rights treaties are held to be distinguished from other treaties regulating particular interests of the States. See in particular pp. 645, 646. See also Kirchner, *supra* note 62, p. 59: “Human rights treaties have arguably reached a status which elevates them over other treaties ...”

recognises that certain provisions in international treaties are different from other provisions:

Paragraphs 1 to 3 [regarding termination or suspension of the operation of a treaty as a consequence of its breach] do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

Human rights treaties must be considered to belong to this category of treaties.⁷⁹ While the Vienna Convention does not explicitly state that these two paragraphs entail multilateral obligations, it is at least evident that these two paragraphs stand out from other paragraphs. Article 60(5) will be analysed with the purpose of identifying the legal effects—if any—of applying this paragraph.

The most important legal consequence of Article 60(5) is that treaties of a humanitarian character cannot be terminated or suspended simply because of a material breach of the treaty.

It must also be asked whether Article 60(5) provides guidance regarding which material breaches of a treaty cannot be accepted. Initially, it seems that Article 60(5) as such does not provide such guidance. Article 50(1) of the Draft Articles on State Responsibility explicitly states that ‘fundamental human rights obligations’ shall not be affected by countermeasures taken by an injured State against a State responsible for an internationally wrongful act.⁸⁰ Hence, no State should be involved in any activities which affect another State’s obligations imposed by fundamental human rights.

Article 60(5) in itself *does not say that humanitarian treaties are to prevail over other international treaties*, and does not help in solving specific conflicts between humanitarian treaties and other treaties.

At the same time, however, if Article 60(5) is applied in order to clarify a treaty provision in a situation with conflicting treaties, it will most likely be done in order to indicate that the treaty relating to the protection of a human person must prevail over the other treaty. Article 60(5) strictly states that the treaties shall continue to apply irrespective of any material breach of any provisions of this treaty. Even if Article 60(5) does not provide much help in identifying the

⁷⁹ This is confirmed by the Swiss delegation, which not only referred to the Geneva Conventions, but also to “conventions of equal importance” including the “protection of human rights in general.” See *UN Conference on the Law of Treaties, Vol. I: First Session, Vienna, 26 March–24 May 1968, Official Records*, p. 354, para. 12. The Swiss delegation stated that “even a material breach of those conventions by a party should not be allowed to injure innocent people.” Their proposal was later presented to the plenary as document A/CONF.39/L.31, *UN Conference on the Law of Treaties, Vol. III: First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Official Records*, p. 269. In the voting, this proposal—presented as a ‘principle’—was included in Article 60 with 87 votes to none, and 9 abstentions. See *UN Conference on the Law of Treaties, supra* note 20, p. 115.

⁸⁰ *Report of the International Law Commission, supra* note 24.

precise nature of obligations in humanitarian treaties, the scope of Article 60(5) also includes human rights treaties.

5.4. Distinctions Made by Legal Authors

There are several authors who have attempted to define the concept of multilateral obligations. One definition is proposed by an author who has been active in setting the agenda for the discussion on the relationship between WTO law and general international law. He finds that the distinctive element is that breaches of multilateral obligations, unlike bilateral obligations, “affect the rights or obligations of all other states bound by the rule concerned. If so, the obligation is of the multilateral/integral nature.”⁸¹

Hence, the author understands multilateral and integral obligations to be more or less the same. His focus is on how breaches by one State ‘affects the obligations of all other States’. While this is a legitimate concern, the consequences he identifies of such a breach (‘affects the obligations’) are similar to interdependent obligations. The breach of integral obligations, on the other hand, concerns all other States, and the obligations do not depend on a corresponding performance by the others.

Other authors emphasise that the collective interest in upholding multilateral obligations is that a State’s breach of an obligation affects the *performance of the treaty*.⁸² This emphasis on ‘performance’ implies that such multilateral obligations arguably come closer to what was understood as interdependent obligations by Fitzmaurice in his 1958 report, in which a violation of obligations by one party prejudices the treaty regime applicable between them all.

Another definition of multilateral obligations which does not emphasise the aspect of performance of a particular legal regime, but rather stresses the widely held interests of the community of States declares: “[A] multilateral obligation is an absolute obligation in customary international law which is binding upon all states in their mutual relations, and that a breach of such an obligation concerns all other states.”⁸³ This definition comes closer to the definition of treaties with integral obligations.

Simply stated, a distinction can be made between a wide definition (emphasising treaty performance) and a narrow definition (obligations are absolute, not dependent upon treaty performance) of multilateral obligations. Both of these obligations stand out from other obligations.

⁸¹ J. Pauwelyn, *The Nature of WTO Obligations*, Jean Monnet Working Papers No. 1/02 (Jean Monnet Center, New York University School of Law, 2002) p. 13.

⁸² Frowein, *supra* note 61, p. 403. See also D.N. Hutchinson, ‘Solidarity and Breaches of Multilateral Treaties’, 59 *The British Yearbook of International Law* (Oxford University Press, Oxford, 1988) p. 153, stating that “parties to a multilateral treaty have a right to its performance ...”.

⁸³ Dominicé, *supra* note 64, p. 357. Under this definition, the term ‘multilateral obligations’ is close to obligations *erga omnes*.

Is it obvious that fundamental human rights must be recognised as imposing multilateral obligations, understood in the narrow sense? The European Court of Human Rights has confirmed such understanding, and this understanding is generally not disputed.⁸⁴ Moreover, the term ‘absolute obligations’ is more precise regarding human rights compared to the term ‘multilateral obligations’ as the latter is wider and subject to different interpretations.⁸⁵ It is important that a distinction is made between treaties where “obligation is self-evident, absolute and inherent for each party, and not depending on a corresponding performance by the others”⁸⁶ (integral obligations of human rights treaties) and treaties in which the “violation of its obligations by one party prejudices the treaty regime applicable between them all”⁸⁷ (interdependent obligations of disarmament treaties).

Finally, it must be identified whether the right to food is giving rise to the concept of multilateral obligations. Section 3.2 analysed whether a distinction must be made between different human rights in the context of obligations *erga omnes*. This analysis is not directly applicable in the context of multilateral obligations. A distinction must be made between obligations which are of legal interest for the international community (obligations *erga omnes*), and obligations to which there are restricted modification possibilities (multilateral obligations). The concept ‘multilateral obligations’ is not yet very clear. It will not be examined in detail whether a wider category of norms fall under this concept compared to the norms under which obligations *erga omnes* are derived.

With regard to human rights, however, the answer seems rather evident. As human rights treaties have no provisions on amendments, there are no possibilities of amending them—even if optional protocols can be adopted. This shows that human rights in general fall under the category of multilateral obligations.

5.5. Distinction Between Different WTO Agreements

It was found in Section 3.3 above, based on three rulings analysed, as well as GATT 1994 Article XXIII:1 on ‘nullification or impairment’, that the other States than those directly affected can raise a dispute before the WTO dispute

⁸⁴ See *Ireland v. United Kingdom*, 1978, Series A, No. 25, p. 90, in which it stated “unlike international treaties of the classic kind, the Convention [European Convention on Human Rights and Fundamental Freedoms] comprises more than reciprocal engagements between contracting States. It creates, over and above a network of mutual bilateral understandings ...”.

⁸⁵ For an elaboration of the non-consistent use of the terms introduced by Fitzmaurice in his 1958 report, *supra* note 65, made subsequently by the ILC, see Tams, *supra* note 2, p. 55.

⁸⁶ *Yearbook of the International Law Commission*, vol. 2 (1958) pp. 27, 28. The State party’s performance of its obligations is crucial; therefore, two or more parties to a treaty giving rise to such obligations cannot modify or otherwise change the treaty.

⁸⁷ *Ibid.* This refers to performance of the treaty regime, not performance of its obligations by a State party.

settlement system. While it was not found that this was sufficient to constitute obligations *erga omnes*, the traditional view that international economic law treaties constitute bilateral obligations only⁸⁸ is not questioned.

Pauwelyn finds that the objective of trade is not of a kind which implies that its obligations could be multilateral. He concludes that:

The way WTO obligations are enforced is exclusively bilateral. WTO dispute settlement does not, in the first place, tackle *breach*, but rather nullification of benefits *that accrue to a particular member*. (...) Most importantly, in case the defendant loses and does not comply within a reasonable period of time, the winning state will be authorised to impose state-to-state countermeasures against the losing state (DSU Art. 22). This exclusively bilateral modality of enforcement of WTO rules is an important indication that most WTO obligations are reciprocal in nature.⁸⁹

These observations might apply to the old GATT 1947, but ‘ignore’ the developments since the establishment of the WTO, including treaties such as TRIPS, Sanitary and Phytosanitary Measure (SPS) and Technical Barrier to Trade (TBT) which are not merely bilateral or reciprocal.

Based on these findings that WTO constitutes something more than merely bilateral relationships, the thesis will now examine whether these treaties might fall within the narrow concept of multilateral obligations—understood as integral or absolute obligations—or if they rather fall within the wider concept of multilateral obligations—understood as interdependent obligations.

The requirements for an obligation to fall within the narrow concept must be considered to be relatively strict. Integral treaties were defined as treaties in which the “obligation is self-evident, absolute and inherent for each party, and *not depending on a corresponding performance by the others*.”⁹⁰ Could the obligations arising under TRIPS be considered to fall within the scope of this definition? In this context, it must also be emphasised that when the ILC has referred to treaties containing such obligations, these treaties have been found to “protect vital matters.”⁹¹

Concerning the narrow understanding of multilateral obligations, while TRIPS might contain obligations which are ‘self-evident, absolute and inherent’, the instrumental nature of the rights protected by TRIPS is not of such a kind that they can be regarded as ‘vital matters’.

It will now be clarified whether WTO obligations fall within the scope of the multilateral obligations (understood in the wide sense of interdependent obligations). Also here, the analysis will start from GATT 1994 Article XXIII:1 on

⁸⁸ See Pauwelyn, *supra* note 81, pp. 12–31. See also Simma, *supra* note 3, pp. 364–366, and W. J. Ethier, ‘Intellectual Property Rights and Dispute Settlement in the World Trade Organization’, 7 *Journal of International Economic Law* (2004) pp. 452, 453.

⁸⁹ *Ibid.*, p. 19.

⁹⁰ *Yearbook of the International Law Commission*, *supra* note 65, pp. 27, 28, emphasis added.

⁹¹ *Yearbook of the International Law Commission*, *supra* note 30, p. 217, para. 13.

‘nullification or impairment’ which addresses situations where ‘*the attainment of any objective of the Agreement is being impeded*’. This provision primarily relates to a situation in which breaches of a treaty negatively affect the overall performance of this treaty. Performance of a treaty constitutes a central element of multilateral obligations (understood in the wide sense of interdependent obligations).⁹² This indicates that WTO obligations might fall within the scope of multilateral obligations. This is further confirmed by TRIPS, which contains provisions on minimum standards for intellectual property protection,⁹³ and where the lack of observance of these standards by one or more States might affect the overall performance of TRIPS.

Therefore, the particular nature of some WTO agreements must be considered to constitute something more than just contractual obligations of a reciprocal nature.

5.6. Legal Consequences of Establishing Multilateral Obligations

The legal consequences of determining that a treaty establishes multilateral obligations is that the treaty cannot be amended by some of the parties (*inter se* agreement). In general, most multilateral treaties are very difficult to amend. Regarding those treaties analysed in this thesis, the Covenant and TRIPS, the latter provides for amendment, and has already been amended in accordance with the 30 August 2003 decision and the 6 December 2005 decision.⁹⁴ There have not been attempts at amending the text of human rights treaties, but the scope of these treaties has been extended by the adoption of optional protocols. With regard to the Covenant, the only amendment that is foreseeable is the adoption of an optional protocol.

Hence, a distinction can be drawn between human rights treaties on the one hand and WTO agreements on the other. This distinction should not be overemphasised, however. Minor amendments of TRIPS are likely,⁹⁵ but not amendments relating to issues such as patentability and exclusive rights.

Are there other distinctions that can be introduced in order to justify a claim that human rights treaties are of a different nature than intellectual property rights?

⁹² See the definitions given by Pauwelyn, *supra* note 81, p. 13, and Frowein, *supra* note 61, p. 403, emphasising that a breach of a treaty affects the obligations of other States or the performance of the treaty.

⁹³ F. Roessler (former director of the WTO Legal Division), ‘Diverging Domestic Policies and Multilateral Trade Regulations’, in R. Hudec and J. Bhagwati (eds.), *Free Trade and Harmonization: Prerequisites for Free Trade, Vol. 2: Legal Analysis* (MIT Press, Cambridge, Massachusetts, 1996) p. 42, states that TRIPS is the only agreement annexed to the WTO Agreement that “establishes positive standards for the conduct of domestic policies.”

⁹⁴ WT/L/540 and WT/L/641, respectively.

⁹⁵ Articles 27(3)(b) and 71(1) of TRIPS explicitly allow for review or amendments of the treaty.

First, the introduction of terms such as ‘law-making’⁹⁶ and ‘constitutional’⁹⁷ emphasise that human rights treaties contain more important norms than other treaties. This is also emphasised by the Commission on Intellectual Property, which states that intellectual property is a “means by which nations and societies can help to promote the fulfilment of human economic and social rights.”⁹⁸

Second, the very restricted possibilities for limitation of the human rights must be noted. Article 4 of the Covenant establishes three requirements for limiting the recognised human rights (based on law; compatible with the nature of the rights; only for the promotion of general welfare). On the other hand, TRIPS provides for several possibilities for the limitations of the rights, in addition to ‘exclusion from patentability’ as found in Article 27(2). Articles 30 (limited exceptions), 31 (other use) and 32 (revocation/forfeiture) all allow for the limitation of the exclusive rights, but all of these provisions are to be applied according to strict criteria. Therefore, in principle, there are more restricted possibilities for limiting the enjoyment of human rights compared with the possibilities that exists under patent rights.

At the same time, the patent right holder has wide opportunities to ensure the exercise of his rights by enforcing the rights by means of persuasion or through the courts. Similar opportunities are not available for those who are not able to fully exercise their human rights.

Therefore, the understanding that human rights constitute multilateral obligations in the narrow sense (integral or absolute obligations) is not the only basis for stating that human rights treaties are of such important value that they must be given certain weight. The particular nature of these treaties and the restricted possibilities for limitations must also be observed. This could imply that human rights treaties might be elevated above treaties regulating matters of a more instrumental nature.

As the definition of ‘multilateral obligations’ is still unresolved, it is difficult to make use of this legal concept as a basis for distinguishing between treaties. It is found, however, that human rights treaties fall within the narrow definition of multilateral obligations, while TRIPS falls within the broad definition of multilateral obligations. At the same time, there are obligations under TRIPS indicating that they have an integral or absolute character, implying that the obligation

⁹⁶ Wolfrum and Matz, *supra* note 5, pp. 131–133.

⁹⁷ Kirchner, *supra* note 62, p. 59.

⁹⁸ Commission on Intellectual Property, *Integrating Intellectual Property Rights and Development Policy* (UK Department for International Development, London, 2002) p. 6. Here, the Commission also finds the following: “In particular, there are no circumstances in which the most fundamental human rights should be subordinated to the requirements of IP protection. IP rights are granted by states for limited times (at least in the case of patents and copyrights) whereas human rights are inalienable and universal.”

is ‘self-evident, absolute and inherent, which includes also some of the enforcement provisions of Part III of TRIPS.’

Therefore, a distinction must be made between those WTO agreements which establish procedures for the liberalisation of trade without establishing substantive standards, and those WTO agreements which establish substantive provisions that allow individuals to exercise exclusive rights.

Moreover, with regard to human rights, rather than concluding definitively based on an unresolved definitional question it is more appropriate to emphasise the nature of human rights and the values such treaties seek to protect. This will also highlight the differences between treaties regulating human rights and treaties regulating intellectual property rights.

6. The Weight of Human Rights Obligations in International Economic Law Interpretation

This analysis has found that there are differences between the two treaties with regard to the recognised rights to be protected, with the Covenant imposing obligations to which all other States have a legal interest, setting out absolute obligations,⁹⁹ and with very limited possibilities for limiting the enjoyment of the rights. It is generally accepted that the WTO primarily regulates reciprocal relationships.

Increasingly, there is also a recognition that the WTO establishes obligations to which other States than the allegedly affected State have legal interests in ensuring compliance as the performance of the treaty is crucial. Moreover, many WTO agreements are actually standard-setting, and are not likely to be amended.

Human rights obligations are of a particular importance in international law. The nature of these treaties implies that they have a certain weight. Certain human rights that individuals should enjoy are more basic or fundamental as they affect the physical integrity of the human being. To have the enjoyment of these human rights restricted in a systematic manner—both through acts of omission and acts of commission—can lead to grave human rights situations.

⁹⁹⁾ *Report of the International Law Commission*, *supra* note 76, p. 297, footnote 640.